STATE OF MICHIGAN

COURT OF APPEALS

RICHARD STIGLMAIER,

Plaintiff-Appellee,

V

DETROIT ENTERTAINMENT, L.L.C., d/b/a MOTORCITY CASINO, and JOHN DOE EMPLOYEES OF DETROIT ENTERTAINMENT, L.L.C.,

Defendants-Appellants.

UNPUBLISHED
August 31, 2004

No. 246465
Wayne Circuit Court
LC No. 00-026997-NZ

STEVEN BARRY STOLMAN, JEFFREY SMITH, RAYMOND SMITH, WILLIAM STANKO, and STANLEY J. PITTMAN,

Plaintiffs-Appellees,

V

DETROIT ENTERTAINMENT, L.L.C., d/b/a MOTORCITY CASINO, and JOHN DOE EMPLOYEES OF DETROIT ENTERTAINMENT, L.L.C.,

Defendants-Appellants.

No. 246466
Wayne Circuit Court
LC No. 01-143092-NZ

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

These consolidated appeals are before this Court pursuant to our Supreme Court's orders, which, in lieu of granting leave to appeal, remanded the cases to this Court for consideration as

on leave granted.[1] Defendant challenges the trial court's order granting plaintiffs' motion for class certification. We reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

These consolidated cases concern the practice of defendant's security personnel allegedly detaining casino patrons for misdemeanor and lesser offenses. Each of the named plaintiffs allege that they were patrons at defendant's casino, and were arrested and detained by defendant's unlicensed security personnel for conduct not amounting to a felony. In particular, plaintiff Stolman alleged that he was detained for taking tokens, chips, or credits left behind by other players in defendant's gaming machines, a practice known as "slot-walking." Plaintiffs sought to certify two classes of plaintiffs: one defined as persons arrested for taking credits, chips or tokens abandoned by other players, and the other as persons unlawfully arrested for misdemeanor or lesser offenses.

At the hearing on plaintiffs' motion to certify the classes, the trial court noted that the classes should be objectively defined in terms of common transactional facts based on defendant's conduct, that the definitions should allow the court to easily identify putative class members, and that identifying class members should not depend upon an adjudication of the merits of each individual's case. The court granted plaintiffs' request for class certification, but redefined the two classes as follows:

> Stiglmaier Class:
>
> All persons who were permanently barred from going onto the defendant's premises *and either* who were detained by then unlicensed member of defendant's security personnel where the reason for detention was a misdemeanor, *or alternatively*, regardless of the licensure of the security personnel, who were detained for a reason that would not amount to either a felony or a misdemeanor.
>
> Stolman Class:
>
> Those persons who were patrons of the defendant and who were detained taking coins, tokens or credits from gambling machines (i.e., for alleged conduct that would fall under provision of MCL 432.218(2)(j),[2] and who were consequently permanently barred from entering defendant's casino.

II. ANALYSIS

---

[1] See *Stiglmaier v Detroit Entertainment, LLC*, 467 Mich 956; 656 NW2d 534 (2003); *Stolman v Detroit Entertainment, LLC*, 467 Mich 956; 656 NW2d 534 (2003).

[2] Although the trial court referred to subsection (j) in its bench opinion, its order erroneously refers to subsection (i).

"This Court reviews a trial court's decision on class certification under the clearly erroneous standard." *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002); see also *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999). "A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Neal*, *supra* at 15; *Zine*, *supra* at 270.

Of particular significance to these cases is MCL 338.1080, which grants a properly licensed private security guard "the authority to arrest a person without a warrant as set forth for public peace officers in . . . MCL 764.15," provided that the private security guard is on duty, on the employer's premises, and in full uniform. In pertinent part, MCL 764.15 allows a public peace officer to arrest an individual for committing a felony and for committing either a misdemeanor or an ordinance violation in the officer's presence. By contrast, MCL 764.16 provides that a private individual may only make an arrest when someone commits a felony, when summoned to help in an arrest by a peace officer, or, if the individual is a merchant or its agent, for first- or second-degree retail fraud, MCL 750.356c and MCL 750.356d. The private individual must then deliver the person arrested to a peace officer "without unnecessary delay." MCL 764.14.

"When evaluating a motion for class certification, the trial court is required to accept the allegations made in support of the request for certification as true." *Neal*, *supra* at 15. "The merits of the case are not examined." *Id*. Here, plaintiffs allege that none of defendant's security guards were licensed from the time defendant opened its casino until August 2000, at which time two security guards became licensed.

Defendant argues that because casinos are a highly regulated business, plaintiffs' classes should not be certified for policy reasons. However, defendant provides no authority for its argument that a trial court should refuse to certify a class solely because of policy reasons where the class otherwise meets the requirements for a class action under MCR 3.501. Arguments not properly briefed and explained will not be pursued. "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). Accordingly, we consider defendant's policy arguments only as they relate to the legal issues discussed below. Further, to the extent defendant argues that, for policy reasons, its *unlicensed* private security guards *should* be allowed to forcibly detain patrons for misdemeanor or lesser offenses, contrary to MCL 338.1080, MCL 764.15 and MCL 764.16, those arguments are best addressed to the Legislature. *Oakland Co Board of Co Rd Comm'rs v Michigan Property & Cas Guaranty Ass'n*, 456 Mich 590, 613; 575 NW2d 751 (1998).

Defendant argues that the trial court erred in finding that the Stiglmaier and Stolman classes satisfied the requirements of MCR 3.501(A)(1) and (2). We agree.

MCR 3.501(A) provides:

> (1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> (a) the class is so numerous that joinder of all members is impracticable;

(b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Plaintiffs have the burden of establishing the requirements for class certification. *Neal*, *supra* at 16. "[*A*]*ll*" of the listed requirements must be met. *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597; 654 NW2d 572 (2002) (emphasis in the original). "[A] case cannot proceed as a class action when it satisfies only some, or even most, of these factors." *Id*.

A. Commonality

Plaintiffs must show that "there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members." MCR 3.501(A)(1)(b). "The common question factor is concerned with whether there 'is a common issue the resolution of which will advance the litigation.'" *Zine*, *supra* at 289. "It requires that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Id*. (internal quotation omitted). In other words, the issue is whether plaintiffs "can demonstrate with common [generalized] proof that the members of the class have suffered a common injury" related to their membership in the class. *A&M Supply Co*, *supra* at 599-600. We conclude that plaintiffs cannot demonstrate a common injury here.

"'The essence of a claim of false imprisonment is that the imprisonment is false, i.e., without right or authority to do so.'" *Moore v Detroit*, 252 Mich App 384, 388; 652 NW2d 688 (2002), quoting *Hess v Wolverine Lake*, 32 Mich App 601, 604; 189 NW2d 42 (1971). Here, the question of whether each putative class member has been falsely imprisoned is a highly individualized one. There are questions of fact not only with respect to the status of defendant's security personnel at the time of each incident, but also with respect to the conduct of each putative class member, and whether that conduct was sufficient for defendant to legally detain each individual.

Similarly, in the Stolman class, as redefined, the overarching legal issue is whether slot-walking, without more, violates MCL 432.218(2)(j), which makes it a *felony* to "[c]laim[], collect[], take[], or attempt[] to claim, collect, or take money or anything of value in or from the gambling games, *with intent to defraud*, without having made a wager contingent on winning a gambling game, or [to] claim[], collect[], or take[] an amount of money or thing of value or greater value than the amount won." (Emphasis added.)

Other necessary elements of false imprisonment are (1) an act committed with the intention of confining another, (2) the act directly or indirectly results in such confinement, and (3) the person confined is conscious of his confinement. *Moore*, *supra* at 387. Brief confinements or restraints are insufficient to establish false imprisonment. *Id.* at 388. There is no false imprisonment if the plaintiff voluntarily agrees to stay with the defendant. *Clarke v Kmart Corp*, 197 Mich App 541, 547; 495 NW2d 820 (1992).

The trial court did not address defendant's liability for assault and battery, plaintiffs' other remaining tort claim. "An assault is 'any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish that contact.'" *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998), quoting *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). A battery is "'the wilful and harmful or offensive touching of another person which results from an act intended to cause such contact.'" *Smith*, *supra* at 260, quoting *Espinoza*, *supra* at 119. Here, again, the question of whether defendant's conduct was reasonable may have a different answer for each individual putative class member.

There are numerous individual fact issues and defenses concerning both claims, and individual determinations of specific conduct will be necessary for each member of the class. Therefore, the trial court clearly erred when it found that the common legal issues predominated over the individual issues and that the resolution of the common legal issues will materially advance the litigation.[3]

B. Typicality

"The typicality requirement . . . directs the court 'to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large.'" *Neal*, *supra* at 21, quoting *Allen v Chicago*, 828 F Supp 543, 553 (ND Ill, 1993). "While factual differences between the claims do not alone preclude certification, the representative's claim must arise from 'the same event or practice or course of conduct that gives rise to the claims of the other class members and . . . [be] based on the same legal theory.'" *Neal*, *supra* at 21, quoting *Allen*, *supra* at 553. "In other words, the claims, even if based on the same legal theory, must all contain a common 'core of allegation.'" *Neal*, *supra* at 21, quoting *Allen*, *supra* at 553. Here, the question of whether the behavior of defendant's personnel constituted an actionable tort varies with each individual class member, and depends on the status of defendant's employees at the time of each incident and the special circumstances leading up to each incident, including the conduct of each individual putative class member.

---

[3] We respectfully note the dissent's proposal to remedy this error by redefining the classes. However, we are of the opinion that were we to do so, several individualized questions of law and fact with respect to the conduct of each putative class member would nonetheless remain, and predominate over any common questions of law and fact. Moreover, the dissent's proposed new class definition would not remedy the problems of typicality and adequate representation that we discuss below.

In a similar federal case that involved a motion for class certification against defendant Detroit Entertainment, the United States District Court for the Eastern District of Michigan held that the putative class members could not meet the typicality element pursuant to Fed R Civ P 23. *Lindsey v Detroit Entertainment, LLC*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued February 6, 2004 (Docket No. 03-CV-71129).[4] In *Lindsey*, the plaintiffs sought to certify a class of people who had been detained by Detroit Entertainment for taking coins or tokens from the floor or open slot machines and using them; this putative class is similar to the putative Stolman class here. *Lindsey*, *supra*, slip op pp 1-3. The court held that the putative class did not satisfy the typicality rule because the plaintiffs did not show that they met the "as goes the claim of the plaintiff, so go the claims of the class" standard. *Lindsey*, *supra*, slip op, p 13, quoting *Stout v Byrider*, 228 F3d 709, 717 (CA 6 2000).

Here, members of both putative classes have diverse issues of law and fact surrounding their claims against defendants. Plaintiffs have not established that the claims of potential class members would fail if plaintiffs' claims fail, nor have they shown that the potential class members' claims would succeed if plaintiffs' claims succeeded.

We hold that the trial court clearly erred in finding that the claims of the named plaintiffs were typical of the claims asserted by each class member.

C. Adequate Representation

This factor focuses on whether the class representatives can fairly and adequately represent the interests of the class as a whole. *Neal*, *supra* at 22. This analysis involves a two-step inquiry. First, the court must be satisfied that the named plaintiffs' counsel is qualified to sufficiently pursue the putative class action. *Id.* Second, the members of the advanced class may not have antagonistic or conflicting interests. *Id.* Here, defendant does not dispute the qualifications of the named plaintiffs' counsel.

However, the merits of each putative class member's case is contingent upon a highly individualized set of facts. By resolving this case in favor of defendants, such a determination could deny recovery to plaintiffs who had otherwise meritorious claims simply because the class representatives' own claims lacked merit. In *Lindsey*, the court held that because the typicality requirement was not satisfied, so too must the adequate representation theory fail because the named plaintiffs have no incentive to pursue the claims of the other class members. *Lindsey*, *supra*, slip op, p 16, citing *In re American Medical Systems, Inc*, 75 F3d 1069, 1083 (CA 6 1996). Because we have held that the typicality requirement was not met here, we also hold that the class representatives cannot fairly and adequately represent all class members because the named plaintiffs would have no incentive to pursue the largely fact-driven claims of the other class members.

III. CONCLUSION

---

[4] "Because there is limited case law in Michigan addressing class certifications, this Court may refer to federal cases construing the federal rules on class certification." *Neal*, *supra* at 15.

As a result of the foregoing, we hold that the trial court clearly erred when it certified the classes. Accordingly, we reverse the trial court's order, and remand for further proceedings consistent with our opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael J. Talbot